BEFORE THE FLORIDA
JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A
JUDGE, NO. 01-244 **CASE NO.: SC01-2670**
CHARLES W. COPE
_____/

MOTION TO STRIKE OR ALTERNATIVELY
RESPONSE TO UNTIMELY MOTION FOR COSTS

The Honorable Charles W. Cope, through his undersigned counsel, moves to strike all portions of the Florida Judicial Qualifications Commission's Reply to Response to Order to Show Cause that references or relates to a motion for costs. In the alternative, Judge Cope responds to Special Counsel's Motion for Costs by requesting this Court to deny such motion and to grant Judge Cope's Motion for Costs and Attorney's Fees which he timely filed in this action on August 22, 2002. In support of this requested relief, Judge Cope states the following:

MOTION TO STRIKE

1. Judge Cope respectfully requests this Court to strike all matters referencing and relating to a motion for costs that are contained in the Florida Judicial Qualifications Commission's Reply to Response to Order to Show Cause and Motion for Costs. Specifically, Judge Cope requests that the last four words of the response title be stricken, the entire second paragraph of the response be stricken and the last four words of the wherefore clause be stricken. Such matters should be stricken because the issue of an award of costs is still presently pending before the Hearing Panel and because Special Counsel's motion filed on behalf of the Florida Judicial Qualifications Commission is untimely and in violation of the time provisions expressly mandated by the Hearing Panel for the filing of motion for

costs relating to these proceedings. The Hearing Panel in its Findings, Conclusions and Recommendations by the Hearing Panel of the Judicial Qualifications Commission, entered on August 2, 2002, expressly ordered the parties to file their motions for costs within twenty (20) days of the August 2, 2002, findings. The findings ordered in pertinent part:

> "The Hearing Panel will address issues as to the costs of this proceeding upon the filing of separate motions which are to be filed within 20 days from the service of these findings."

Pursuant to the ruling of the Hearing Panel Judge Cope timely filed his motion for costs and attorney's fees with supporting legal authority on August 22, 2002. In contrast, Special Counsel did not file any motion for costs within the time period ordered by the Hearing Panel. Nor did Special Counsel file any motion seeking relief from such mandated time period. In addition, Special Counsel to this date has offered no justification whatsoever for his failure to comply with the Hearing Panel's time requirements for the filing of motions for costs or for failing to seek relief from such time provisions. Special Counsel did, however, file a response to Judge Cope's motion for costs and attorney's fees. Special Counsel also filed an untimely motion for costs related to certain requests for admissions. These matters are still pending before the Hearing Panel, therefore it would be inappropriate for this Court to entertain Special Counsel's motion for costs which was inappropriately included within the Florida Judicial Qualifications Commission's Reply to Response to Order to Show Cause that was permitted to be filed by this Court.

WHEREFORE, Judge Cope respectfully requests this Court to strike the above referenced provisions from the Florida Judicial Qualifications Commission's Reply to Response to Order to Show Cause.

RESPONSE TO UNTIMELY MOTION FOR COSTS

If for some reason this Court elects not to grant Judge Cope's motion to strike set forth above, then Judge Cope responds to Special Counsel's untimely motion for costs as follows:

2. Before the charges were even filed in the case, on October 22, 2001, Judge Cope appeared before the Investigative Panel and acknowledged through his counsel his intoxication in California and the inappropriate consensual behavior with the woman in his hotel room. Accordingly, before any formal charges were filed Judge Cope readily acknowledged the conduct which the Hearing Panel appropriately concluded had occurred.

3. Thereafter, the Investigative Panel on December 6, 2001, filed the formal notice of six charges without any investigation. The charges contained in the formal notice essentially mirrored the criminal charges that had been filed earlier in California. Judge Cope was ultimately acquitted on all such criminal charges.

4. A week after the formal charges were filed on December 13, 2001, counsel for Judge Cope engaged in an hour long telephone conference with Special Counsel John Mills of the JQC. In that conference Mills admitted that he had drafted the charges. He further admitted that the JQC had not investigated the underlying facts; and that he had drafted the charges "with the idea in mind that the women were total liars." In that conversation Cope's counsel acknowledged Cope's readiness to take full responsibility for the public intoxication in California and the inappropriate intimate consensual conduct with a woman in his hotel room. Special Counsel was advised that Judge Cope would fully cooperate with the JQC and had nothing to hide. Special Counsel was further advised that Judge Cope had observed

intimate details of the woman's apparel and physical anatomy which if independently confirmed would establish that Cope's rendition of the facts was truthful. Special Counsel asserted in that conversation that the JQC was not concerned about Cope's private conduct in the privacy of his hotel room; but was concerned about the allegations of the misconduct on the beach. The JQC had charged Judge Cope alternatively with making unwanted advances on the beach, consistent with the woman's false charge of criminal battery and false claim of having fled Judge Cope on the beach, rather than having voluntarily accompanied him to his hotel room, which she did. Special Counsel was advised that Judge Cope's conduct with the woman on the beach was consensual. Ultimately, the Hearing Panel agreed with Judge Cope's contentions that he had asserted from the outset.

5. On March 27, 2002, after conclusion of most of the discovery in the case, Special Counsel admitted to Judge Cope and his counsel that the JQC could not prove Counts II, IV and V and the majority of the allegations in Count I. Moreover, he apologized to Judge Cope for doubting his veracity.

6. Thereafter, Special Counsel forwarded a stipulation, attached as Exhibit 16 to Judge Cope's Motion to Dismiss for Discovery and for Hearing on the Grounds of Selective and Vindictive Prosecution, in which the JQC acknowledged that Judge Cope's version of the events was correct; and that Judge Cope did not attempt to force the woman to have sex with him in any way. Special Counsel further stipulated that Judge Cope did not steal the woman's key and was not the man at the door.

7. Thereafter, however, the JQC sought to compel Judge Cope's false admission to the alleged aggravating conduct in Count III of the complaint that related to Judge Cope

allegedly taking advantage of the woman. Significantly, such conduct was not supported by the evidence and, in fact, conclusively refuted by the evidence. Judge Cope offered instead to acknowledge responsibility for the conduct that the evidence established under Count III, including the intimate conduct in the privacy of his hotel room. The JQC refused to entertain this plea and insisted that Judge Cope plea to proposed findings and a recommendation of discipline (Exhibit 17 to Motion to Dismiss for Discovery and for Hearing on the Grounds of Selective and Vindictive Prosecution) which asserted that Judge Cope engaged in "adulterous conduct," raised questions about Judge Cope's "moral character" and further purported to find that Judge Cope had taken advantage of the woman in California due to her intoxicated state and asserted emotional vulnerability. Judge Cope objected to these finding on the grounds that they were false, gratuitously inflammatory, totally unsupported by the evidence and impermissibly stigmatizing.

8. When Judge Cope refused to plead to facts which were conclusively disproven by the evidence, the JQC through Special Counsel and General Counsel, Thomas MacDonald, advised that the JQC would proceed to prosecute all of the charges, notwithstanding the lack of evidence, and upon conviction would seek Judge Cope's removal from office.

9. Under no circumstances can the JQC be construed as the "prevailing party," since from the time before charges were even filed Judge Cope acknowledged the conduct which was specifically found to have occurred by the Hearing Panel and offered at all times to accept full responsibility for that conduct.

9. Judge Cope is the prevailing party to this action given that a directed verdict was granted in his favor on all of the counts that were at issue in the proceedings before this

Commission. Though this Commission in its Findings, Conclusions and Recommendations found that Judge Cope acted inappropriately with regard to having been publicly intoxicated and having engaged in inappropriate conduct of an intimate nature, Judge Cope never contested, and, in fact at all times during the course of these proceedings, admitted to having engaged in such regrettable conduct. He also admitted that such conduct was inappropriate and warranting of a public reprimand. Special Counsel, however, irrationally and unreasonably insisted on pursuing in these proceedings the unfounded and unwarranted charges of attempted forcible entry, theft, lying to the police and failing to report. Special Counsel did so in an admitted effort to have Judge Cope permanently removed from the bench after admitting approximately four months before the trial of this matter that insufficient evidence existed to support prosecution of the charges of attempted forcible entry, theft, lying to police and failure to report. Special Counsel, as the record in this case establishes, attempted to embarrass Judge Cope into resigning. It was only those unwarranted and unfounded charges for which a directed verdict was ultimately entered that were ever at issue in these proceedings. Judge Cope, having obtained a directed verdict on the only charges that were ever at issue in these proceedings, is the prevailing party in this action and as such is entitled to an award of those reasonable and necessary costs that he incurred in defense of the unfounded and unwarranted charges unreasonably pursued by the Special Counsel in his irrational effort to have Judge Cope removed from the bench.

10. Rule 2.140, Judic. Admin, Rules, provides in pertinent part:

> THE SUPREME COURT MAY AWARD REASONABLE AND NECESSARY COSTS, INCLUDING COSTS OF INVESTIGATION AND PROSECUTION, TO THE PREVAILING PARTY. NEITHER ATTORNEYS' FEES NOR TRAVEL

EXPENSES OF COMMISSION PERSONNEL SHALL BE INCLUDED IN AN AWARD OF COSTS. TAXABLE COSTS MAY INCLUDE:

(1) court reporters' fees, including per diem fees, deposition costs, and costs associated with the preparation of the transcript and record; and

(2) witness expenses, including travel and out-of-pocket expenses.

11. In Moritz v. Hoyt Enterprises, Inc., 604 So.2d 807 (Fla. 1992), the Florida Supreme Court held that "the party prevailing on the significant issues in the litigation is the party that should be considered the prevailing party . . . " As stated above, there was never any issue in these proceedings concerning Judge Cope's having engaged in the conduct for which this Commission has recommended he be reprimanded. Judge Cope at all stages of these proceedings admitted to Special Counsel, the Investigative Panel and the Hearing Panel that he engaged in such conduct and that his actions were inappropriate and deserving of a public reprimand. This Commission expressly found with regard to count I, Public Intoxication: "Both Judge Cope and his counsel admitted that his conduct under this charge was entirely inappropriate." (Findings, Conclusions and Recommendation by the Hearing Panel of the JQC, p. 5). This Commission similarly found with regard to Count III, Inappropriate Conduct of an Intimate Nature: "Again both Judge Cope and his counsel consistently agreed that his conduct under this charge was entirely inappropriate." (*Id.*, p.6). In contrast, the only matters at issue in the proceedings before this Commission was whether Judge Cope had committed theft of the hotel room key, had attempted to forcibly enter into and peer inside the hotel room, had made material false statements to the police and had inappropriately failed to report the citizen's arrest to the JQC and litigants appearing before

him. A directed verdict was ultimately entered by the Commission in Judge Cope's favor on all such issues. Accordingly, Judge Cope is the party that prevailed on the significant issues of the litigation and should be considered the prevailing party for purposes of awarding costs pursuant to Rule 2.140 of the Rules of Judicial Administration.

12. Those costs that Judge Cope reasonably and necessarily incurred in defense of the significant issues in these proceedings are set forth in the affidavit of costs and attorneys fees attached as Exhibit A to Judge Cope's Motion for Costs and Attorney's Fees, and incorporated herein by reference. Such costs total $72,470.29.

13. In addition to being entitled to an award of his costs as a result of being the prevailing party, Judge Cope should also be awarded the reasonable and necessary attorneys fees that he incurred in defending against the unfounded charges of theft, attempted forceful entry/peering, lying to the police and failure to report, pursuant to §57.105, Florida Statutes.

14. Section 57.105, Florida Statutes provides in part:

> (1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:
>
> (a) Was not supported by the material facts necessary to establish the claim or defense; or
>
> (b) Would not be supported by the application of then-existing law to those material facts.

§ 57.105(1)(a), (b), Fla. Stat. (2000).

15. Judge Cope, at all stages of these proceedings, repeatedly pointed out to the Special Prosecutor that the charges of theft, attempted forceful entry/peering, lying to the police and failure to report were not supported by the material facts necessary to establish such charges. Judge Cope also repeatedly pointed out to the Special Prosecutor that the charges were not founded in the law. For example, Judge Cope repeatedly reminded the Special Prosecutor that Judge Cope's failure to report the misdemeanor citizen's arrest to the JQC did not violate any legal duties or judicial cannons[1]. Judge Cope raised these issues with the Special Prosecutor orally, in writing and by way of formal motions. Judge Cope herein incorporates his Motions for Dismissal Due to Vindictive Prosecution and Selective Prosecution and his motions for Summary Judgment that were filed in these proceedings. As described in detail in such documents Special Counsel admitted that there was no legal or factual basis to pursue the claims of theft, attempted forceful entry/peering, lying to the police and failure to report and that he knew he could not obtain a conviction on such charges. Special Counsel nonetheless continued to prosecute such charges in violation of his legal and ethical obligations in an effort to embarrass Judge Cope into resigning. A directed verdict was ultimately granted by this Commission on the charges of theft, attempted forceful entry/peering, lying to the police and failure to report because such charges had no basis in law or fact.

16. As a result of the Special Prosecutors irrational and unreasonable prosecution of Judge Cope on charges that the Special Prosecutor knew to be unfounded in law and fact,

[1] The Hearing Panel expressly found with regard to the failure to report charge: "As to count VI, the panel finds there was no legal or ethical Canon that forms the basis of the charge. . . Despite requests by the Chair of this Panel for case law or Canon authority, none have been supplied. In the absence of a Canon to point to, Judge Cope cannot be properly found guilty of a violation unless his inaction would bring the judiciary into disrepute and there is no clear and convincing evidence on this point." (p. 15).

Judge Cope was forced to incur substantial attorneys fees and costs. Judge Cope's attorneys fees through July, 2002 that he incurred in defense of the unfounded claims total $316,465.00 for legal representation by the law firm of Merkle & Magri, P.A.

17. In addition, the Special Counsel's Motion for Costs and Attorney's Fees is untimely in that it is violative of the time provisions ordered by the Hearing Panel for the filing of any motions for costs. The Hearing Panel in its Findings, Conclusions and Recommendations by the Hearing Panel of the Judicial Qualifications Commission, entered on August 2, 2002, expressly ordered the parties to file their motions for costs within twenty (20) days of the August 2, 2002 Findings.[2] Judge Cope timely complied with the Hearing Panel's ruling. Special Counsel, however, did not and has offered no reasonable justification for his failure to comply with the Hearing Panel's time requirements for the filing of motions for costs.

18. Not only was Judge Cope the prevailing party and Special Counsel's Motion for Costs and Attorneys Fees untimely, the affidavits submitted by Special Counsel in opposition to Judge Cope's Motion for Costs and Attorneys Fees presents false and misleading assertions of fact to this Court. For example, in paragraph 4 of his affidavit Mr. Mills seeks to present his conduct in the context of a plea negotiation. Such characterization is inaccurate. Mr. Mills, in fact,

[2] That Order stated: "The Hearing Panel will address issues as to the costs of this proceeding upon the filing of separate motions which are to be filed within 20 days from service of these findings."

volunteered together with General Counsel, Thomas MacDonald, their acknowledgement on March 27, 2002, that the JQC possessed insufficient evidence to establish the relevant charges against Judge Cope. The stipulations drafted by Mr. Mills and submitted to Judge Cope acknowledging this fact are plainly worded and speak for themselves.

19. In paragraph 5 of his affidavit Mr. Mills asserts that he recommended settlement because the case boiled down to a "swearing contest." As Mr. Mills was well aware, the fact that the alleged victim had lied concerning the events on the beach and subsequent events in Judge Cope's hotel room had been conclusively established in discovery. Accordingly, there was no "swearing contest." Rather, Special Counsel, despite prolonged efforts to obstruct discovery, was confronted with conclusive evidence of the victim's perjury and statements to Carmel police, which she herself recanted. In addition, Special Counsel was aware through the deposition of the "victim" and the depositions of the police officer who took her initial reports that she made serial false reports to the police concerning the events in question. Again these were not a matter of conjecture or supposition and did not implicate a "swearing contest." Mr. Mills' sworn assertion of continuing belief in the "victim's" story is remarkable given the victim's own admission during the trial of Judge Cope that she had, in

fact, given false reports to the police and lied under oath. (Trial testimony excerpt pgs. 154-155 attached as Exhibit A)

20. Special Counsel in paragraphs 6 and 7 of his affidavit asserts that a second factor which led him to recommend a settlement was a misrepresentation by Judge Cope's counsel concerning evidence casting doubt on Lisa Jeanes credibility. Mr. Mills specifically asserted under oath that he was advised by Mr. Merkle that a former boyfriend would testify that she had the same anatomical feature that Judge Cope claimed to have witnessed on her body; and claims that Mr. Merkle was unable to provide such evidence and that the boyfriend testified the victim did not have the same anatomical feature. This is a clear misrepresentation by Mr. Mills as evidenced by the deposition transcript of the first boyfriend to be deposed, Daniel Meagher. (Attached as Exhibit B.) The second boyfriend deposed, Stephen Hance, in fact provided a statement to Judge Cope's investigator corroborating the identical anatomical feature. (See Affidavit of Investigator Lindsay Colton attached as Exhibit C.) As Mr. Mills was well aware the reason that the second boyfriend, Stephen Hance, did not testify to such feature in his deposition was because Mr. Mills prior to the deposition being taken objected to such testimony on the grounds of relevancy and the court in response limited the scope of Judge Cope's inquiry in such regard. (See Motion

for Protective Order attached as Exhibit D and Order attached as Exhibit E.)

21. Concerning Special Counsel's allegation that the second boyfriend "testified that the only time he even suspected that Lisa had had a recent abortion was when Judge Cope's investigator falsely told him that she had;" the second boyfriend, Stephen Hance, did not testify to such. (Attached as Exhibit C is the affidavit of Investigator Lindsay Colton regarding her initial interview of that boyfriend.) What Mr. Mills neglects to point out to the Court is that prior to the deposition of that boyfriend, in which he substantially changed his position, he had been in virtual daily contact with the "victim" Lisa Jeanes concerning his prospective testimony. At no time did the investigator tell this boyfriend that the "victim" had an abortion.

22. If as Special Counsel asserts in paragraph 8 of his affidavit that he advised the Investigative Panel that he believed there was clear and convincing evidence of guilt, it is plain that Mr. Mills mislead the Investigative Panel.

23. Special Counsel's rendition of events occurring before the Investigative Panel on Friday, April 12, 2002, is similarly false and misleading. While apparently no minutes were taken of that meeting, Judge Cope, in fact, expressed his deepest heartfelt regret and remorse

for his conduct. Judge Cope made no demands on the Investigative Panel whatsoever. The purpose was to set before the Panel, *inter alia*, the facts of the case as documented through discovery to demonstrate that the reported insistence of proceeding to hearing on those charges which discovery had proven to be false was inappropriate, unnecessary and a waste of the resources of all concerned.

24. Of equal concern is the affidavit of General Counsel, Thomas MacDonald, Jr., that was filed in opposition to Judge Cope's motion for costs and attorney's fees. Mr. MacDonald asserts in paragraph 3 thereof that neither he nor John Mills ever stated or suggested that either of them did not believe there was sufficient evidence to support a finding against Judge Cope on "all counts" in these proceedings. The remarks by both Mr. Mills and Mr. MacDonald to Judge Cope in the presence of his attorneys Robert Merkle and Louis Kwall are accurately set forth above. Both, in fact, agreed that they had insufficient evidence to prove specific charges pending against Judge Cope, i.e., counts II, IV, V and the majority of the allegations in Count I. In fact, Mr. MacDonald went so far as to volunteer that he had to talk Judge Wolf (of the Hearing Panel) into accepting the fact that insufficient evidence existed with regard to such matters. Mr. MacDonald attests in paragraph 3 of his affidavit that "at no point - - - did I or Mills - - ever state or suggest that either of us did

not believe there was sufficient evidence to support a finding against Judge Cope on all counts in these proceedings." Notably, Mr. MacDonald's affidavit is cleverly literally true. Such assertion however, is misleading. Judge Cope has never contended that they said that Mr. Mills and Mr. MacDonald had insufficient evidence on all the counts as Mr. MacDonald characterizes in his affidavit; rather Judge Cope has consistently asserted that on March 27th Mr. Mills and Mr. MacDonald volunteered that they had insufficient evidence to prove by the clear and convincing standard the allegations in Counts II, IV, V and the majority of the allegations in Count I. Mr. MacDonald therefore conveys a literal truth, i.e., that they never said they could not prove "all the charges;" however the representation obfuscates the fact that Mr. Mills and Mr. MacDonald confessed inability to prove the counts noted.

25. In a similar vain, Mr. MacDonald in paragraph 5 of his affidavit attests that "at no point have I or anyone else - - including Mills - - participated in the prosecution of Judge Cope without believing that Judge Cope was guilty as charged." Here again the affidavit's assertion is misleading. It is also irrelevant. At issue is Mr. Mills and Mr. MacDonald's clear acknowledgement that the JQC had insufficient proof against Judge Cope, not what Mr. Mills and Mr.

MacDonald's personal beliefs were as to Judge Cope's guilt on charges, which the evidence did not support.

WHEREFORE, JUDGE COPE RESPECTFULLY REQUESTS THIS COURT TO DENY SPECIAL COUNSEL'S MOTION FOR COSTS AND ATTORNEY'S FEES, AND TO ENTER A JUDGMENT IN FAVOR OF JUDGE COPE IN THE AMOUNT OF $72,470.29 SO AS TO COMPENSATE JUDGE COPE FOR THE REASONABLE AND NECESSARY COSTS HE INCURRED IN THESE PROCEEDINGS. JUDGE COPE FURTHER REQUESTS THIS COURT TO ENTER A JUDGMENT IN THE AMOUNT OF $316,465.00 SO AS TO COMPENSATE JUDGE COPE FOR THE REASONABLE AND NECESSARY ATTORNEYS FEES HE INCURRED IN DEFENDING THE KNOWINGLY UNFOUNDED CHARGES OF THEFT, ATTEMPTED FORCEFUL ENTRY/PEERING, LYING TO THE POLICE AND FAILURE TO REPOR

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via Federal Express to: **Judge James R. Jorgenson**, Chair of the Judicial

Qualifications Commission Hearing Panel, 3rd District Court of Appeal, 2001 S.W. 117th Avenue, Miami, Florida 33175-1716; **John Beranek, Esq.,** Counsel to the Hearing Panel of the Judicial Qualifications Commission, P.O. Box 391, Tallahassee, Florida 32302; **John S. Mills, Esq.**, The Mills Firm, 200 North Laura Street, Suite 1150, Jacksonville, Florida 32202; **Heather Ann Solanka, Esq.**, Special Co-Counsel, Foley & Lardner, 200 Laura Street, Jacksonville, Florida 32201-0240; **Brooke S. Kennerly**, Executive Director of the Florida Judicial Qualifications Commission, 1110 Thomasville Road, Tallahassee, Florida 32303; **Thomas C. MacDonald, Jr., Esq.**, General Counsel to the Investigative Panel of the Judicial Qualifications Commission, 100 North Tampa Street, Suite 2100, Tampa, Florida 33602, this 16th day of October, 2002.

ROBERT W. MERKLE, ESQ.